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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 17 1997

REPLY TO THE ATTENTION OF

S-6J

CERTIFIED MAIL

Richard S. VanRheenen
VanRheenen & Associates, P.C.
One North Pennsylvania Street, Suite 530
Indianapolis, Indiana 46204

RE: Decision of the Director, Superfund Division
as to Accra Pac's Dispute with regard to the
Enforcement Action Memorandum
Accra Pac Site, Elkhart, Indiana
U.S. v. Accra Pac and Estate of Warner Baker
Northern Dist. of Indiana, No. H89-113

Dear Mr. VanRheenen:

This letter constitutes the decision of the Director, Superfund Division, on the formal dispute brought by Accra Pac on July 21, 1997, pursuant to the dispute resolution procedures set forth in Section XVII of the above-referenced Consent Decree. This Consent Decree settled claims of the United States against Accra Pac and the Estate of Warner Baker brought pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607.[1] The Consent Decree is also subject to CERCLA's implementing regulations, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), codified at 40 C.F.R. Part 300. The dispute relates to certain findings of U.S. EPA, Region 5, set forth in the Enforcement Action Memorandum (EAM) dated March 8, 1996 for the Accra Pac Site, located in Elkhart, Indiana (Site). In its Statement of Position, filed on July 21, 1997, Accra has asked that the EAM be modified in accordance with the objections raised by the company. The U.S. EPA Statement of Position was filed on August 26, 1997. (Hereafter, Accra Pac Stmt. of Pos., and EPA Stmt of Pos., respectively).

Under the terms of Section XVII of the Consent Decree, as Director of the Superfund Division, I am to render the final administrative decision on the dispute on the basis of the Administrative Record for the dispute. The administrative record index, listing the documents upon which this decision was based, is attached. This document discusses (1) the nature of the dispute, (2) the standard of review which was applied to the dispute, and (3) the substance of the determination.

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[1] The Estate of Warner Baker is not a party to this dispute.

I. Nature of the Dispute

To understand the dispute raised by Accra Pac, one must understand the unique procedural circumstances under which the Accra Pac Consent Decree was concluded and the EAM was issued. Typically, a U.S. EPA decision document is issued prior to a referral of a CERCLA matter for enforcement of a §106 unilateral order, or a §107 cost recovery action. However, in the case of Accra Pac, the enforcement action was brought prior to the conduct of an extent of contamination study, so U.S. EPA had not issued a decision document.

During the litigation of the Accra Pac matter, an extent of contamination study was completed; however, a study of the most appropriate technologies for addressing the contamination found by the extent of contamination study, similar to a feasibility study in the remedial program, had not been initiated at the time the Consent Decree was negotiated. Thus, the Scope of Work (SOW), in Paragraph II.B.1.b., called for the following: (1) Accra Pac's conduct of a technology review, designated as a treatability study, which was subject to U.S. EPA review and approval. Under the same SOW paragraph, U.S. EPA's decision on the response alternatives were also subject to the public comment procedures of the NCP; after U.S. EPA's consideration of the comments submitted during the comment period, the Agency was to issue a decision on the available alternatives. Under the Consent Decree and the SOW, Accra Pac, subsequently, is obligated to implement U.S. EPA's decision, subject only to the dispute resolution procedures set forth in Section XVII of the Consent Decree.

The requirements of Paragraph II.B.1.b. were followed: (1) Accra Pac completed the treatability study, which contained a recommendation as to the appropriate technologies to be utilized at the Site, and (2) U.S. EPA, adopting Accra Pac's recommendations subject to public comment, issued a "proposed plan' and conducted a public comment period from September 16 to October 15, 1996. Since only one, favorable, comment was received during the public comment period, on March 8, 1997, Region 5 issued the EAM. Accra Pac instituted an informal dispute in its letter of May 2, 1997, and the formal dispute resolution processes via its July 21, 1997 Statement of Position.

In its Statement of Position, Accra Pac challenges, as misleading, the following factual assertions and legal determinations contained in the EAM: (1) the Site poses an imminent and substantial danger to human health and the environment, (2) contaminated groundwater poses a health threat because someone may drink the groundwater even though municipal water is the source of drinking water for residents in the vicinity of the Site, (3) contaminated soils are severely contaminated and pose a substantial health risk from contact or inhalation,

(4) contaminated groundwater from the Site has adversely affected the St. Joseph River, (5) U.S. EPA was awarded costs from Accra Pac as reimbursement for the extension of municipal water to the East Jackson area, and (6) the use of terms such as "confirmed U.S. EPA's worst fears," "soup of VOCs," and "severely contaminated." Accra Pac states that due to these misleading assertions, the company faces the publicizing of these inaccurate assertions by the media, or a baseless potential toxic tort lawsuit that the company nevertheless would have to defend. Letter of Richard VanRheenen dated May 2, 1997, (Administrative Record for this dispute, Document # 10, "AR Doc. # 10"), which was incorporated into the Accra Pac's Stmt. of Pos., AR Doc. # 14.

Accra Pac also challenges U.S. EPA statements related to the treatment of the hydrocarbon-contaminated soil at the Site. The EAM states that this contaminated soil must be dug up and properly disposed of, or that the Settling Defendants must "otherwise demonstrate to U.S. EPA that residual soil contamination levels do not present an inordinate risk to human health or the environment." EAM, page 10. Accra Pac's challenge is to the following statement, also contained at page 10: "The decision to waive or modify the cleanup standards set in this Action Memorandum and/or the Consent Decree is at the sole discretion of U.S. EPA." Id., AR Doc. # 8.

II. Commitment to Agency Discretion

I must first decide whether the dispute brought by Accra Pac is cognizable under the terms of the Consent Decree. Accra Pac has invoked its rights under Paragraph II.B.1.b. of the SOW to challenge the substance of the U.S. EPA response action decision. However, the treatability study submitted by Accra Pac recommended bio-venting and soil vapor extraction for soils, and air sparging, biosparging and groundwater extraction and treatment for the groundwater, which was the same alternative selected by U.S. EPA in the March 8, 1997 EAM. Thus, the parties have no dispute regarding the substance of the decision set forth in the EAM. Rather, the dispute revolves around the legal findings and factual assertions contained in the EAM that are detailed in the preceding section of this decision.

Under Section 104 of CERCLA, the President is authorized to take removal or remedial action to address the actual or threatened release of hazardous substances into the environment. These authorities have been delegated to myself, as Director of the Superfund Division, and are further explained through CERCLA's implementing regulations codified in the NCP and contained in U.S. EPA guidance. Regarding the March 8, 1997, EAM, unless I find that

Region 5 departed from the terms of the Consent Decree, NCP requirements, or U.S. EPA guidance, I have determined that the legal findings and factual statements contained in the EAM are matters that were in the discretion of Region 5, U.S. EPA. Accra Pac's ability to dispute the Agency's response action decision does not extend to the ability to question the Agency's legal and factual determinations, especially where the parties are in agreement as to the cleanup technologies which will be applied at the Site.

I will now determine whether there was a departure from the Consent Decree or Agency regulation or guidance, in either substantive or procedural aspects, in the issuance of the EAM.

Accra Pac argues that U.S. EPA was not required to issue an Enforcement Action Memorandum, that all the Agency was required to do was to "signify its final approval of the Treatability Study," and that this could have been accomplished by "a brief notice that no adverse public comments were received and thus [U.S.] EPA's earlier provisional approval was final." Accra Pac Stmt. of Pos., pp. 2, 3, AR Doc. 14. However, in Paragraph II.B.1.b. of the SOW, U.S. EPA is called upon to do more than merely approve the treatability study. It is called upon to render a decision on "remedial alternatives and of applicable ARARs for the air remediation system." SOW, ¶ II.B.1.b., AR Doc. # 4.

I find that the EAM in this case was issued to document the Agency's response action decision pursuant to Sections 104 and 113(k) of CERCLA, 42. U.S.C. §§ 104 and 113(k); Sections 300.160 and 300.820 of the NCP, 40 C.F.R. §§ 300.160 and 300.820, and the Action Memorandum Guidance, OSWER Directive 936-.3-01 (December 1990). Hence, I find that the statutory and regulatory prerequisites for its issuance have been met.

Additionally, since there is no actual dispute between Accra Pac and U.S. EPA as to the substance of the response action decision, I also decide that the legal conclusions and factual findings contained in the EAM are committed to U.S. EPA's discretion. In obtaining the right, through the entry of the Consent Decree and the SOW herein to dispute the substance of U.S. EPA's response decision, Accra Pac did not, correspondingly, obtain the right to dispute the language used by U.S. EPA, particularly in the absence of a substantive dispute. For U.S. EPA to have issued the mere "approval of the treatability study" urged by Accra Pac would have been arguably inconsistent with the NCP, but certainly with the Agency's Action Memorandum guidance. Thus, I find that the dispute raised by Accra Pac is not cognizable under the dispute resolution provisions of the Consent Decree. However, I also think it important to

rule on the alternative grounds raised by the parties in their respective Statements of Position, and I will address these issues now. [2]

III. Scope of Review

The second decision I must make with regard to this dispute is whether it shall proceed under Paragraph 55 of the dispute resolution provisions, as urged by Accra Pac, or, alternatively, whether, as urged in the U.S. EPA Statement of Position, the dispute should proceed under Paragraph 54. Paragraph 54 of the Consent Decree applies to all disputes "pertaining to the selection or adequacy of any response action . . .that are accorded review on the administrative record. . ." Paragraph 55 applies to disputes "that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law."

In support of its position, Accra Pac stated that "The matters in dispute here are [U.S.] EPA's method of signifying final approval of the Treatability Study, and whether [U.S.] EPA has unreviewable discretion over the adequacy of a demonstration regarding risks posed by residual soil contamination." Accra Pac, Stmt. of Pos., page 4, AR Doc. #14. However, as discussed in the preceding section, since U.S. EPA rendered a decision as to "remedial alternatives and of applicable ARARs for the air remediation system," as mandated by the SOW, ¶ II.B.1.b, AR Doc. 4, the decision was clearly a decision "pertaining to the selection or adequacy of any response action," and, accordingly, the dispute must proceed under Paragraph 54.

CERCLA §113(j)(2) provides that:

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[2] Accra Pac has also challenged U.S. EPA's characterizations of the contamination, in a couple of different sections of the Action Memorandum as "severe," as well as phrases such as "confirm the U.S. EPA's worst fears" and "soup of VOC contamination" as subjective and emotion-provoking. 5/2/97 memo of Richard VanRheenen, AR Doc. # 11 at pp. 2-3, incorporated into Accra Pac Stmt. of Pos., AR Doc. #14. As determined later in this decision, U.S. EPA has demonstrated that its findings are not arbitrary and capricious. Accordingly, I determine that such characterizations are also delegated to the Agency, and that it would be a waste of Division Director resources to edit U.S. EPA's decision documents paragraph by paragraph, line by line, at any time a potentially responsible party under CERCLA disagrees with the characterizations contained therein.

> "In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law."

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. . . .[T]he agency must examine the relevant data and articulate a satisfactory explanation, including a rational connection between the facts found and the choice made. . ." A court should not overturn the Agency's decision unless it finds that the Agency did not consider the relevant factors or if there "has been a clear error of judgment." In the Matter of Bell Petroleum Services, Inc., 3 F.3d.889 at 904 (5th Cir. 1993), quoting, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co. 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (citation and internal quotation marks in Motor Vehicle case omitted). Accord, U.S. v. Northeastern Pharmaceutical, 810 F.2d 726 (8th Cir. 1986), In Re Acushnet River & New Bedford Harbor, 722 F.Supp. 888 (D.Mass. 1989), U.S. v. Seymour Recycling Corporation, (S.Dist. Ind. 1987).

I find that, in determining whether to sustain the dispute raised by Accra Pac, I should use the same standards prescribed by statute and judicial precedent for court review of Agency response determinations. Hence, I will review Accra Pac's challenges to the EAM under an arbitrary and capricious standard. Unless Accra Pac can demonstrate that the challenged assertions were arbitrary and capricious or otherwise not in accordance with law, Accra Pac's dispute must be denied.

IV. Were the Challenged Assertions an Arbitrary Exercise of U.S. EPA's Authority?

Finding of Imminent and Substantial Endangerment

U.S. EPA's determination, contained in the EAM, of an imminent and substantial endangerment is based upon the Agency's findings that the following factors, listed in the NCP at 40 C.F.R. § 300.415(b)(2) for the conduct of a removal action, have been met: (1) actual or potential exposure to nearby populations, animals, or the food chain from hazardous substances or pollutants or contaminants; (2) actual or potential contamination of drinking water supplies or sensitive ecosystems; and (3) high levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate. EAM, at pp. 4-6, AR Doc. # 8. As set forth in its Statement of Position, U.S. EPA argues that if U.S. EPA were not arbitrary and capricious in its finding as to at least one of these NCP factors, the Agency was entitled to make an imminent

and substantial endangerment determination. U.S. EPA Stmt. of Pos. at 8, AR Doc. #15. Accra Pac, on the other hand, relies upon statements contained in the Extent of Contamination Study, which was completed by Accra Pac. 5/2/97 Memo of Richard VanRheenen, AR Doc. # 11, incorporated into the Accra Pac Stmt. of Pos., AR Doc. 14.

I will apply the legal standards for deciding whether there is an imminent and substantial endangerment as set forth on page 6 of the U.S. EPA Statement of Position. Since Accra Pac did not submit a reply to the U.S. EPA Statement of Position and did not challenge this discussion, although it had the clear right to do so under the dispute resolution provisions of the Consent Decree, (see Paragraph 54.a., AR Doc. # 3), I will assume that U.S. EPA's Statement of Position correctly articulates the legal standard in this area. Thus, as stated in the U.S. EPA Statement of position, "if the record demonstrates a threatened or potential harm, the factors giving rise to the harm are present, and there is a reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened release of a hazardous substance, U.S. EPA was not arbitrary and capricious in making its imminent and substantial endangerment finding." EPA Stmt. of Pos. at p. 8., AR Doc. # 15.

In making its determination that Site conditions constituted an actual or potential exposure to nearby populations, animals, or the food chain from hazardous substances or pollutants or contaminants, U.S. EPA relied upon sampling values contained in the Weston Sper report, which was part of the administrative record for the EAM.[3] The Weston Sper report documented the soil contaminant levels found after the removal of several underground storage tanks from the Site. EAM AR. Orig, Doc. 01-0114, at pp. 3-4. U.S. EPA based its finding that there was a potential exposure to nearby populations upon its knowledge that the soil contaminant levels contained in the pit were very high, at the time the EAM was issued the pits from which the underground tanks were taken were not entirely secured, and the Site's proximity to a residential area.

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[3] This decision will make reference to two separate administrative records. The administrative record which was first in time was the administrative record supporting the EAM. Since this dispute revolves around factual findings and legal determinations set forth in the EAM, and I must determine whether these findings and determinations were arbitrary and capricious in light of the EAM's administrative record, considered as a whole, the EAM administrative record has been incorporated into the administrative record for this dispute. The EAM administrative record comes in five parts: original AR, and updates 1 through 4. For ease of reference in this decision, a document which only appears in the EAM administrative record will be referred to, as follows: EAM AR Orig. [or Update __], Doc. # __.

Accra Pac did not directly address or reply to the "actual or potential exposure to nearby populations" factor set forth in the EAM or in the U.S. EPA Statement of Position. Based upon the above discussion, I find that the determination, contained in the EAM, that this factor was present at the Site was not arbitrary and capricious.

Actual or potential contamination of drinking water supplies

Another EAM finding challenged by Accra Pac was the finding that the severely contaminated Site groundwater had the potential to endanger parties in the plume of the groundwater. EAM, AR Doc. # 8 at pp. 5-6. Accra Pac argued that the Extent of Contamination Study stated that, with the provision of an alternate water supply "for all present and future users", "the [S]ite does not therefore present an imminent, immediate or potential risk to human health." EAM AR Update # 1, page viii (Executive Summary); Accra Pac 5/2/97 memo at p. 2. Accra Pac also stated that the EAM decision for the Accra Pac Site is inconsistent with the attenuation remedy selected in the Record of Decision (ROD) for the Galen Myers site. Accra Pac 5/2/97 memo at p. 2; Galen Myers ROD, AR Doc. 19, at 3, 28.

U.S. EPA, aware of the alternative drinking water system, still argued that the potential exists for use of the groundwater as a drinking water source, and based its finding upon its knowledge that there exists very little regulation or control of the water well drilling business in Indiana. EPA Stmt. of Pos. at 11. In the absence of enforceable limitations against groundwater use, U.S. EPA argued that is conceivable that someone could, for industrial or even residential use, have a well placed in the path of the plume, and with the severity of the contamination of the groundwater close to the Site, subject himself, his employees, or family members to the dangers of the various VOC's. Id. U.S. EPA also contended that Accra Pac's arguments of inconsistency with the Galen Myers ROD were unavailing, and that the differential levels of contamination present at the two sites justified disparate treatment by the Agency. Galen Myers Action Memorandum, AR Doc. # 24; Galen Myers ROD, AR Doc. # 19; EPA Stmt. of Pos. at 11.

Under the legal standards enunciated above, I determine that it was not arbitrary and capricious for U.S. EPA to find that there is a threatened or potential harm of ingestion of the contaminated groundwater and a reasonable cause for concern that someone or something may be exposed to that risk of harm. Thus, I must deny Accra Pac's challenge to the factual assertion that the groundwater poses an imminent and substantial threat.

Assertions the Soil Poses an Imminent and Substantial Threat

Accra Pac argues that the soil contaminant levels shown in the table contained at page 4 of the EAM are below the cleanup criteria for the Indiana Department of Environment (IDEM) Voluntary Remediation Program (VRP) Tier II Clean-up Standards for the Non-Residential Scenario (Tier II standards) for surficial soils, and that these Tier II standards are recognized by U.S. EPA, as set forth in a December 4, 1995 Memorandum of Agreement (MOA) between U.S. EPA and IDEM. Accra Pac Stmt. of Pos. at 4; MOA, AR Doc. # 20. However, in reviewing this discussion, I note that the highest level of tetrachloroethene measured is almost an order of magnitude above the Tier II level for subsurface soils.

The Accra Pac Statement of Position also contains an incorrect inference as to the circumstances in which the Tier II standards would be recognized by U.S. EPA. First, according to the eligibility standards for the VRP, the Accra Pac Site would never have been accepted for this program, because of the U.S. EPA CERCLA §§ 106, 107 enforcement action and the resulting consent decree. Guidance: Indiana Voluntary Remediation Program Resource Guide, AR Doc. # 21 at p. 1, MOA, AR Doc. 20 at p. 2. Secondly, the Memorandum of Agreement does not in any way, contrary to inferences contained in the Accra Pac Statement of Position, indicate that where soil contamination is below Tier II standards, U.S. EPA cannot make an imminent and substantial endangerment determination. On the contrary, the Tier II standards are inapplicable where, as in the EAM, U.S. EPA has made such a determination. MOA, AR Doc. 20 at p. 2.

Additionally, IDEM has recently prepared a draft guidance for use in the VRP program, Guidance, Risk-Integrated System of Cleanups, IDEM, Office of Environmental Response by (Agency-wide Manual, Internal Draft, Sept. 4, 1997). This draft guidance states certain situations in which the Tier II standards would be inapplicable. Certain of these conditions are present at Accra Pac: (1) sites with contaminant source areas (subsurface soil) greater than 0.5 acres, and (2) sites that have a vapor intrusion, or where air vapor levels from the contamination at the site are above acceptable health-based levels. AR Doc. 25 at 29.

The Accra Pac Site consists of approximately 2.3 acres; subsurface soil contamination in the saturated zone at the Site exists throughout the entire Site. Extent of Contamination Study, EAM AR Update # 1, Doc. # 06-0004 , Vol. I, Cross Sections C-C', E-E', G-G', H-H'. Under current conditions, the second condition listed in the previous paragraph is not present. However, as discussed elsewhere in this decision, there exists the possibility that there may be future use at the Accra Pac Site. If the existing concrete cover that covers the Site were to be broken up during future development, based on the subsurface soil contamination documented in the Weston Sper report, there might well be a vapor intrusion or air vapor levels from contamination at the

Site which are above acceptable health-based levels. EAM AR. Orig, Doc. 01-0114 at pp. 3-4. Accordingly, the Tier II standards would not be considered applicable at the Accra Pac site.

In support of its position that the levels of soil contamination do constitute an imminent and substantial endangerment, U.S. EPA points to the high soil contaminant levels discovered in the Westen Spur report, EPA Stmt. of Pos. at pp. 9-10, the possibility that the Site is a prime candidate for future use, and the difficulty of enforcing the deed restrictions imposed as part of the Consent Decree. EPA Stmt. of Pos. at 11-12. Accra Pac claims that it is speculative that construction would ever occur in this area, or that the deed restrictions imposed upon the Estate of Warner Baker as part of the Consent Decree would not be followed. Accra Pac 5/2/97 memo at 4-5, AR Doc. # 10. However, U.S. EPA notes that "the Accra Pac [S]ite is within an active industrial park in the City of Elkhart, which is close to the Indiana tollway, a rail line, and one of the main intersections in the City, so future use of the [S]ite certainly is conceivable." EPA Stmt. of Pos. at 12. U.S. EPA's concerns regarding the enforceability of the deed restrictions, especially as to subsequent Site owners, is based primarily upon the fact that the Agency did not obtain an easement or some other type of interest that runs with the land, although the restrictions purport to do so. EPA Stmt. of Pos. at 12.

Again, applying the legal standards enunciated above, I find that the U.S. EPA was not arbitrary and capricious in finding that soil contaminant levels present an imminent and substantial endangerment to public health or the environment. No one, neither Accra Pac nor U.S. EPA, can determine what will happen with regard to the future development of the Site or the enforceability of the deed restrictions. If U.S. EPA is right about either future development or the uncertainties involved in the enforcement of the deed restrictions against subsequent owners, the Agency would be justified in its findings of an imminent and substantial endangerment. Moreover, under the arbitrary and capricious standard, U.S. EPA does not have to demonstrate that its concerns are "more likely than not," but only that it considered the relevant factors and that there has not been "a clear error of judgment." See, the discussion of the legal standard contained at p. 6, infra, of this decision.

Based upon the Site's location and the proximity of several different means of transportation, I cannot find that there is a clear error of judgment here. Similarly, the Agency's concerns about the enforceability of deed restrictions is not clearly erroneous. Given (1) the inapplicability of the Tier II standards, (2) that even if the standards were applicable, a level of tetrachloroethene was found which is almost an order of magnitude above subsurface Tier II standards, and (3) Accra Pac's failure to demonstrate that U.S. EPA is guilty of a clear error of

judgment, I must deny Accra Pac's protest as it relates to whether the soil contamination constitutes an imminent and substantial endangerment.

Assertions the Groundwater Has Affected The St. Joseph River

Accra Pac challenges several statements made in the EAM that relate to the impact that the groundwater at the Accra Pac Site will have on the St. Joseph River. EAM, pp. 1, 4-6. The EAM found that there would be a discharge of contaminants from the groundwater into the St. Joseph River and that there exists the potential exposure of persons using the river for recreational purposes. The Extent of Contamination study documented total groundwater VOC concentrations ranging from non-detect to 649,450 parts per billion, EAM AR Update # 1, Doc. 06-0004, Appendix A , but concludes that "because of the dilution from the tremendous flow of the river [1,426,000 gallons per minute] it would be highly improbable that the concentration of the contaminants would increase to a statistically significant level because of natural attenuation." Id., pp. 139-140; 5/2/97 Memorandum, AR Doc. 10.

The administrative record for the EAM, particularly in the Extent of Contamination Study, EAM AR Update # 1, Doc. 06-0004, contains several different calculations for the length of time that it would take groundwater contamination from the Accra Pac Site to reach the St. Joseph River, because this cannot measured directly . These varying calculations differentially affect the views of the parties as to the risk that the groundwater contamination poses to the St. Joseph. While Accra Pac emphasizes that "some estimates state that it would take several lifetimes for the plume to reach the river," Accra Pac Stmt. of Pos. at p. 6., U.S. EPA emphasizes the hydraulic conductivity values taken from soil samples on the Site, which results in an estimate of 6.2 years. Id, at 92; EPA Stmt. of Pos. at 10. U.S. EPA also emphasizes the travel time calculated from standard, optimum values published for the types of sands and sediments that are present on-Site; the calculated travel time to the river ranges from 8.5 days to 1.5 years. EAM AR Update # 1, Doc. 06-0004 at 92; EPA Stmt. of Pos. at 10. The U.S. EPA Statement of Position also notes that if the Site-related contaminants were contained within a point-source discharge, it is doubtful that the untreated discharge would qualify for an NPDES permit. EPA Stmt. of Pos. at 10.

While there is some support in the record for the position of both parties, again, the inquiry does not rest on an even-handed view as to which position is supported by the weight of the evidence. Given the high levels of Site-related groundwater contamination present at the Accra Pac Site, and evidence that that contamination could reach the St. Joseph River in as little as 8.5 days, I cannot find that U.S. EPA was arbitrary and capricious in its assertions that the contaminated groundwater, in the absence of the actions selected in the EAM, serves as a source of continuing discharge to the St. Joseph River.

V. Does the EPA Retain the Sole Authority to Waive or Modify the Cleanup Standards for the Hydrocarbon-Contaminated Soil?

Accra Pac also challenges the statements contained at page 10 of the EAM, which relate to the appropriate response for the hydrocarbon-contaminated soil at the Site. The EAM determines, after the application of the selected technologies that any residual soil contamination, in excess of the cleanup standards set forth in the SOW, must either be dug up or subjected to a risk assessment to "otherwise demonstrate to U.S. EPA that residual soil contamination levels do not present an inordinate risk to human health or the environment." EAM, page 10.

Accra Pac's challenge is to the following statement, also contained at page 10: "The decision to waive or modify the cleanup standards set in this Action Memorandum and/or the Consent Decree is at the sole discretion of U.S. EPA." Id., AR Doc. # 8). Accra Pac states that the approved Revised Treatability Study is to be incorporated into the Consent Decree and SOW. Hence, Accra Pac's position is that "any determination with respect to a demonstration of the acceptability of leaving residual soil contamination in place would be subject to the dispute resolution provisions of the Consent Decree." 5/2/97 VanRheenen ltr., AR Doc. # 10 at 3.

The U.S. EPA response is that while Accra Pac did obtain the right to challenge the U.S. EPA decision as to which technologies will meet the cleanup standards set forth in the SOW and incorporated into the Consent Decree, Paragraph II.B.1.b. of the SOW does not give Accra Pac the right to challenge the cleanup standards. According to the U.S. EPA Statement of Position, Accra Pac's proposal to perform a risk assessment in the event of the selected soil cleanup technologies' inability to meet the cleanup levels, and to substitute that risk assessment for its duty to otherwise dig up and properly dispose of the residually-contaminated soils, would constitute a variance from the cleanup standards, not an alternate means of meeting them. EPA Stmt. of Pos. at 13.

While I acknowledge that, with regard to the implementation of the Consent Decree, both parties are subject to the continuing jurisdiction of the District Court, I also am aware that, in a typical RD/RA consent decree, the content of the remedy decision contained in the ROD is a given, and is not subject to the dispute resolution provisions of the decree. What is subject to the dispute resolution provisions are the means of carrying out a given remedy decision. With regard to the Consent Decree in this matter, Accra Pac has an unusual right to challenge the substance of U.S. EPA's remedy decision. However, as set forth in U.S. EPA's Statement of Position, "Accra Pac did not, in the Statement of Work or in the Consent Decree, negotiate any type of absolute right to submit and have the Agency consider this risk assessment; presumably, the

results of the risk assessment could modify a current requirement of the Scope of Work. In contrast to U.S. EPA's decision on the treatability study, Accra Pac did not obtain the right to take the conclusions of any risk assessment to dispute resolution." EPA Stmt. of Pos. at 13.

I overrule Accra Pac's challenge to this portion of the EAM, and find that U.S. EPA's acceptance or rejection of any risk assessment submitted that would propose to modify the cleanup standards set forth in the SOW and incorporated within the Consent Decree is not subject to the dispute resolution provisions of the Consent Decree. Such a decision is solely within the discretion of the Agency.

VI. Was U.S. EPA "Awarded" Its Response Costs In the Consent Decree?

Accra Pac has also objected to a statement in the EAM that U.S. EPA was awarded its costs of response as part of the settlement embodied in the Consent Decree, as the issue of the Agency's cost recovery was settled and not litigated. EAM at p. 3; 5/2/97 VanRheenen ltr. at 6, AR Doc. # 10. In its Statement of Position, U.S. EPA conceded that Accra Pac is correct in this contention, and offered to include in the Administrative Record for the EAM a letter or memorandum with the following statement:

> At page three of the Enforcement Action Memorandum, there is a statement that U.S. EPA was awarded the costs of connecting the private residences to the City of Elkhart's municipal water supply system. To the extent that this statement implies that the court made a finding on the issue of Accra Pac's and the Estate of Warner Baker's (Settling Defendants') liability for these responses costs, that implication is incorrect. U.S. EPA's claim for these costs was among the matters settled as part of the Consent Decree entered between (sic) the parties; this Consent Decree did not contain a finding or admission of liability on the part of the Settling Defendants.

EPA Stmt. of Position at 13.

I find that Accra Pac's contentions in this regard are justified and also find that U.S. EPA's suggested method of correcting the statement that could give rise to an incorrect inference will adequately protect Accra Pac's interests. Accordingly, I direct that such a statement be placed in the Administrative Record for the Enforcement Action Memorandum for the Accra Pac Site.

VII. Conclusion and Appeal Rights

I deny Accra Pac's dispute with regard to all but one of disputed assertions and findings contained in the Enforcement Action Memorandum, and determine that these findings are committed to the discretion of U.S. EPA. With regard to the statement contained in the EAM that U.S. EPA was awarded its response costs against Accra Pac, I direct that the statement, set forth in Section VI of this decision, be placed into the Administrative Record for the Enforcement Action Memorandum at the Accra Pac Site.

Accra Pac has the right to appeal the decision of the Director, Superfund Division, by filing a notice with District Court within 10 days of its receipt of this decision. The index for the administrative record upon which the decision was based is attached to this decision. The administrative record itself is maintained in the Region 5's Superfund Records Center. Although we think that Accra Pac has access to all of the documents contained in the administrative record, Accra Pac may receive a copy of any of the documents upon request to the Superfund Record Center. Any request should be directed to Janet Pfundheller, Superfund Division Records Manager, SMR-7J, Region 5, U.S. EPA, 77 W. Jackson, Chicago, IL 60604. Ms. Pfundheller may also be reached by telefax at (312) 353-1042.

Date: 12/17/97

Wm. E. Muno

William E. Muno
Director, Superfund Division